

1969

Vulcan Steel Corporation v. Abraham Markosian v.  
Vulcan Steel Corporation And J. Dean Gerstner  
And Abraham Markosian v. Vulcan Steel  
Corporation And J. Dean Gerstner : Appellants'  
Brief

Utah Supreme Court

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

**VULCAN STEEL CORPORATION,**  
*Plaintiff-Appellant,*

vs.

**ABRAHAM MARKOSIAN,**  
*Defendant-Respondent,*

**ABRAHAM MARKOSIAN,**  
*Plaintiff-Respondent,*

vs.

**VULCAN STEEL CORPORATION**  
**and J. DEAN GERSTNER,**  
*Defendants-Appellants,*

**ABRAHAM MARKOSIAN,**  
*Plaintiff-Respondent,*

vs.

**VULCAN STEEL CORPORATION**  
**and J. DEAN GERSTNER,**  
*Defendants-Appellants.*

Case No.

11551

**APPELLANTS' BRIEF**

Appeal from an Order of Partial Summary Judgment  
of the Third Judicial District Court in and for  
Salt Lake County, State of Utah, Honorable  
Bryant H. Croft, Judge

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**FILED**

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*Plaintiff-Respondent,*

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and J. DEAN GERSTNER,  
*Defendants-Appellants,*

ABRAHAM MARKOSIAN,  
*Plaintiff-Respondent,*

vs.

VULCAN STEEL CORPORATION  
and J. DEAN GERSTNER,  
*Defendants-Appellants.*

Case No.  
11554

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APPELLANTS' BRIEF

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STATEMENT OF THE CASE

This action is a consolidation of three lawsuits involving the rights and obligations of Vulcan Steel Corporation and its two shareholders J. Dean Gerstner and Abraham Markosian.

## DISPOSITION IN LOWER COURT

On February 24, 1969, the Third Judicial District Court in and for Salt Lake County, State of Utah, entered an order granting respondent Markosian's Motion for Partial Summary Judgment thereby requiring Vulcan Steel Corporation to redeem Abraham Markosian's stock at a price to be determined in accordance with a certain agreement executed on April 12, 1965.

## RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the lower court's Order of Partial Summary Judgment.

## STATEMENT OF FACTS

In the spring of 1965, J. Dean Gerstner and Abraham Markosian commenced negotiations to organize a steel fabricating business. At that time Gerstner was a majority shareholder in several family corporations engaged in the steel business and had a steel plant, machinery, equipment and steel inventories located in Salt Lake City, Utah. On April 12, 1965, Markosian and Gerstner executed an Agreement whereby the parties would commence the steel fabricating business at the Gerstner plant site under the name of Vulcan Steel Corporation. Gerstner received 51% of the stock of the Corporation in exchange for steel inventories located at the plant site (R. 6). Markosian subscribed to 49% of the stock to be paid as follows (R. 7):

1. Ten Thousand (\$10,000.00) Dollars in cash.

2. Ten Thousand (\$10,000.00) Dollars on or before May 1, 1965.

3. Twenty Thousand (\$20,000.00) Dollars on or before April 1, 1966.

Markosian paid the initial \$10,000.00 on the date required by the Agreement and \$10,000.00 on May 5, 1965, but failed and refused to pay the final \$20,000.00 subscribed for under the Agreement on the date of April 1, 1966, as therein provided (R. 118).

The Agreement provided that Gerstner would be president and treasurer of the Corporation and that Markosian would be vice-president, general manager and secretary (R. 7). The Agreement also required the Corporation to employ Markosian for five years at \$800.00 per month plus 5% of the net profits before taxes (R. 7). In return, Markosian was required to devote his entire time and efforts to the affairs of the Corporation for the term of five years (R. 8).

The Agreement contained restrictions on the sale of the stock by the parties to the extent that the Corporation had first option to buy in the event a party desired to dispose of his stock (R. 9). However, at the request of Markosian, subparagraph 3 (c) was inserted into the Agreement to provide for mandatory re-purchase of stock by the Corporation in the event Markosian's employment was terminated by the Corporation (Markosian's Deposition, p. 63). Subparagraph 3 (c) reads as follows (R. 10):



*“(c) Mandatory Obligation to Purchase Stock Offer.*

At the termination of employment by Corporation of Markosian or Gerstner for any reason, it shall be mandatory for Corporation to purchase all of the stock of Markosian, Gerstner, or any stockholder or transferee giving written notice as herein provided of his or her intention to dispose of his or her stock  
 . . .”

Whether the Corporation purchased stock under its first option or under the mandatory provisions of subparagraph 3 (c), the purchase price was to be determined under the same formula. The formula, as contained in subparagraph 3 (c), required an increase of depreciated values to fair market value and the addition of good will at the rate of  $2\frac{1}{2}$  times the average profits for the previous five years (R. 10).

On January 5, 1968, Markosian decided to terminate his employment with Vulcan Steel Corporation and made preparations to organize a new steel company known as Mark Steel in competition with appellant Corporation (R. 118). Thereafter, Markosian, knowing he was quitting business with Vulcan Steel Corporation, and resigning his position as vice-president, general manager, secretary and director, secretly and without notice to the appellant Corporation deposited to Vulcan Steel Corporation's account the sum of \$20,000.00 as payment for purchase of the outstanding balance of his subscription obligation (R. 118). Thereafter, on January 23, 1968, Markosian voluntarily

terminated his employment with Vulcan Steel Corporation in a letter by his attorney which stated as follows (R. 119) :

“Mr. Markosian submits herewith his resignation as vice-president, general manager, secretary and as director of the Corporation to become effective as of the date hereof.”

Respondent in said letter demanded re-purchase by the Corporation of the shares of stock owned by him in said Corporation pursuant to subparagraph 3 (c), Mandatory Obligation to Purchase Stock Offered, at the increased price therein provided (R. 119).

The Court in its order granting respondent Markosian's Motion for Partial Summary Judgment has ordered appellant Vulcan Steel Corporation to redeem Markosian's stock at the present time in accordance with the formula provided in the mandatory re-purchase clause (R. 136). Appellant Vulcan Steel Corporation appeals from that order.

## ARGUMENT

THE ORDER OF PARTIAL SUMMARY JUDGMENT INTERPRETING THE AGREEMENT OF APRIL 12, 1965, TO REQUIRE A MANDATORY RE-PURCHASE OF STOCK IN THE EVENT OF A VOLUNTARY RESIGNATION BY RESPONDENT MARKOSIAN IS ERRONEOUS FOR THE FOLLOWING REASONS:

A. THE COURT'S INTERPRETATION DISREGARDS PART OF THE PARTICULAR

LANGUAGE PERTAINING TO TERMINATION BY THE CORPORATION.

- B. THE COURT'S INTERPRETATION IGNORES OTHER SECTIONS OF THE AGREEMENT WHICH SPECIFICALLY PROVIDE FOR VOLUNTARY RESIGNATIONS FROM THE CORPORATION AND FOR THE FREE SALE OR DISPOSITION OF STOCK TO OUTSIDERS.
- C. THE COURT'S INTERPRETATION PERMITS THE RESPONDENT TO PROFIT FROM HIS OWN WRONG BY BREACHING THE TERMS OF HIS EMPLOYMENT AGREEMENT.
- D. SUBPARAGRAPH 3 (C) SHOULD BE CONSTRUED AGAINST RESPONDENT MARKOSIAN SINCE THIS PROVISION WAS INITIALLY DRAFTED BY HIS ATTORNEY.
- E. IF THE AGREEMENT IS AMBIGUOUS CONCERNING A MANDATORY REPURCHASE, THEN THE COURT SHOULD RECEIVE PAROL EVIDENCE AS TO THE INTENT OF THE PARTIES BECAUSE:
  - 1. THE AGREEMENT WAS NOT INTENDED AS AN INTEGRATED DOCUMENT; RATHER, IT CONTEMPLATED A SEPARATE AND ADDITIONAL

EMPLOYMENT CONTRACT WHICH  
WOULD DEFINE THE RIGHTS AND  
DUTIES OF EMPLOYMENT.

2. THE DIVERGENT OPINIONS OF THE  
PARTIES WOULD AT LEAST INDICATE  
THAT THE CONTRACT IS UNCERTAIN  
IN THIS REGARD AND REQUIRES  
AMPLIFICATION BY PAROL  
EVIDENCE.

\* \* \* \*

- A. THE COURT'S INTERPRETATION  
DISREGARDS PART OF THE PARTICULAR  
LANGUAGE PERTAINING TO TERMINATION  
BY THE CORPORATION.

The language in question is as follows (R. 9) :

*"(c) Mandatory obligation to purchase stock offered. At the termination of employment by Corporation of Markosian or Gerstner for any reason, it shall be mandatory for Corporation to purchase all of the stock of Markosian, Gerstner, or any stockholder or transferee . . ."*

The interpretation adopted by the Court disregards or fails to give effect to the words "by Corporation". Under such interpretation, those words might as well be deleted from the phrase, so it would read as follows:

*"At the termination of employment by Corporation of Markosian or Gerstner for any reason . . ."*

Since those words were not deleted, but were in fact included, they must be there for a purpose and must be given

meaning and effect. The intent of the Agreement by so including them was to provide that upon the termination *by the Corporation*, there would be a mandatory repurchase. This was the protection desired by Markosian as the minority stockholder, so that if his employment relationship was terminated by the Corporation for any reason, his investment would not be frozen in the Corporation. He would have no control over such a contingency. However, he would have control over a voluntary resignation and therefore the parties provided for such contingency by permitting a voluntary sale, subject only to the first option rights of the Corporation under subparagraph 3 (b) of the Agreement. If the language of the mandatory repurchase clause was extended to all instances of termination of employment, whether by the Corporation or voluntarily, the Corporation would be powerless to resist such termination and would have to purchase the stock of Markosian regardless of the fact Markosian was the party breaching the contract.

The mandatory repurchase provision of subparagraph 3 (c) contemplates action at a particular time when it talks about "at the termination of employment *by the Corporation*". The only action contemplated is that by the Corporation. If the respondent intended any different meaning, the same could have been clearly indicated.

That the parties contemplated the possibility of termination by the Corporation is evidenced by language on page 3 of the Agreement, which states: "... unless Corporation notifies Markosian in writing within 60 days of the end of the term, or any extension thereof, *of its intention to*

*terminate such Agreement . . .*" (emphasis added) (R. 8). This provision which precedes the mandatory repurchase paragraph clearly indicates that the parties had in mind that under certain circumstances the company would terminate the Agreement and, therefore, it is logical for the parties to provide what the duties of the Corporation would be in such event.

The cases hold that the word "by" contemplates action and the usual definition is that "by" means "through the means, act, or instrumentality". *U. S. Fidelity & Guaranty Co. v. Industrial Commission of Colorado*, 45 P. 2d 895, 899, 96 Colo. 571; *O'Brien v. East River Bridge Co.*, 55 N. Y. S. 206, 208, 36 App. Div. 17.

The words "by the indemnified" have been construed to mean "the act of the indemnified". *American Credit Indemnity Co. v. Cassard*, 34 A. 703, 704, 83 Md. 272.

Words "by order of the court" or "by the court" have consistently been construed to mean by court action or under the supervision of the court. *Aetna Cas. & Sur. Co. v. Sampley*, 134 S. E. 2d 71, 74, 108 Ga. App. 617; *Howell v. Van Houten*, 296 S. W. 2d 428, 430, 227 Ark. 84.

The words "by such electors" have been construed to mean that the action must be by the electors and not by agents. *O'Keeffe v. Dugan*, 172 N. Y. S. 558, 559, 185 App. Div. 53.

Applying the foregoing case authority to the instant case it is clear that action was contemplated by someone and the only person designated was the Corporation. We

are, therefore, talking about termination by Corporation and not termination of employment with Corporation. The interpretation by the Pretrial Judge is such that the words "by Corporation" might as well have been deleted from the Agreement, but since they were not deleted from the Agreement, and if they are to be given some meaning, then the only possible meaning would be that of providing for the rights of the parties upon termination by the Corporation and not upon voluntary resignation by the respondent.

B. THE COURT'S INTERPRETATION IGNORES OTHER SECTIONS OF THE AGREEMENT WHICH SPECIFICALLY PROVIDE FOR VOLUNTARY RESIGNATIONS FROM THE CORPORATION AND FOR THE FREE SALE OR DISPOSITION OF STOCK TO OUTSIDERS.

After discussing the rights and duties of the parties upon termination of employment by Corporation, the Agreement discusses the rights of the parties in the event they voluntarily decide to terminate their employment (R. 12). Since the attention of the parties and the draftsmen were specifically called to the question of what should happen if the parties voluntarily resigned, the Court should not now read into the contract additional provisions involving this situation not specifically specified by the parties. It is a fundamental rule of construction that where the parties have specifically discussed a subject matter, the Court should not infer or add provisions involving that subject matter not so specifically discussed.

Likewise, subparagraph 3 (b) is ignored by an interpretation which invokes subparagraph 3 (c) upon the voluntary resignation of an employee. Subparagraph 3 (c) is designed to protect employees at the instance of a termination by the Corporation. Subparagraph 3 (b) offers adequate protection to employees in the event they voluntarily resign. To enlarge the scope of subparagraph 3 (c) is to limit the scope of subparagraph 3 (b).

The District Judge, in his Memorandum Decision on Motions for Partial Summary Judgment, appears to have done just that and to have ignored the first option provision of subparagraph 3 (b). The Memorandum Decision on Motions for Partial Summary Judgment gives the basis for the ruling which is here being appealed. That memorandum decision lists the restrictions upon the sale of Vulcan Steel Corporation stock and then reasons that the restrictions reflect the intention of the parties to provide for mandatory redemption by the Corporation rather than to permit the stock to be sold or transferred by the parties to the Agreement (R. 132 & 133). This reasoning is specious because it fails to distinguish between a mandatory obligation to redeem and restrictions upon the sale of stock to outsiders. Merely because a corporation imposes certain restrictions upon the sale of its stock does not mean that it has a mandatory obligation to redeem. Subparagraph 3 (b) specifically gives the employee the right to sell to an outsider after having first given the Corporation an opportunity to redeem. This first option provision was not mentioned in the memorandum decision, thereby creating the



impression that the employees had no option but to sell to the Corporation and that the Corporation had a corresponding obligation to purchase under every set of circumstances.

C. THE COURT'S INTERPRETATION PERMITS THE RESPONDENT TO PROFIT FROM HIS OWN WRONG BY BREACHING THE TERMS OF HIS EMPLOYMENT AGREEMENT.

If the Court's interpretation is sustained, it permits this respondent to voluntarily resign and force the Corporation to purchase his stock at a premium, when in fact, as a result of his breach of employment contract, the Corporation is suffering substantial damage. On page 5 under the mandatory repurchase provisions, the formula provides for payment for good-will computed at two and one-half times the yearly average profits during the previous five years. The actual facts of this case are that Vulcan Steel Corporation made money while Markosian was in its employ, since it permitted the Corporation to capitalize upon the joint efforts of both Markosian and Gerstner. The Corporation now, without the benefit of this top echelon, management and ability, has in fact suffered financially and will continue to suffer until a suitable replacement can either be trained or hired from other sources, which is very difficult. The profits of the Corporation have declined since the resignation of Markosian. The respondent Markosian knows better than anyone else the problems he has left the Corporation; yet his construction of the Agreement would permit him to leave the Corporation voluntarily and

then require the Corporation to pay him a premium for his stock in the Corporation. The Agreement provides that the respondent devote his entire time and efforts to the affairs of the Corporation for a period of five years, which period of time has not yet elapsed (R. 7 & 8). Respondent Markosian is therefore breaching this provision of the Agreement.

If the present interpretation of the Agreement is sustained requiring a mandatory repurchase of Markosian's stock at a premium, thus permitting the respondent to profit from his own wrong, Gerstner hereby serves notice that he may be required to invoke the provisions of subparagraph 3 (e) requiring a liquidation and dissolution of the Corporation and distribution to the parties of their respective interests. Such undesirable procedure would at least permit both of the parties to be treated on the same basis and receive such value as rightfully belongs to both parties rather than permitting a wrongdoer to receive a premium at the expense of the innocent remaining party.

Not only is the Corporation losing the benefit of Markosian's services in a crucial area, damaging the Corporation and causing loss of profits, but in addition, Markosian is now a competitor of the Corporation and is soliciting and procuring business from former customers and new business which might have been available to the Corporation. Under such circumstances, it is unconscionable for the Court to make a strained interpretation of this Agreement, ignoring provisions of the contract, and reading into the contract provisions not intended by the parties, thus

permitting this respondent to profit by his own wrongful conduct.

D. SUBPARAGRAPH 3 (C) SHOULD BE CONSTRUED AGAINST RESPONDENT MARKOSIAN SINCE THIS PROVISION WAS INITIALLY DRAFTED BY HIS ATTORNEY.

The Court, before ruling on these provisions of the Agreement, should receive evidence which would show that the respondent, as a minority stockholder, was concerned about protecting himself and not having his investment frozen into the Corporation in the event the Corporation terminated his employment. This is a matter over which he would have no control; however, he does have control over voluntarily resigning and different criterions would therefore be involved in each instance. Because of this concern of Markosian, his attorney suggested and drafted the provisions for the mandatory repurchase.

Q. Now I want to refer to the Agreement of April 12th, which is marked "Markosian Exhibit No. 1" and refer to paragraph 3-c, Mandatory Obligation to Purchase Stock Offered on page 5 and ask you if you would refer to that.

A. Yes, sir.

Q. Was that clause prepared by your attorneys for insertion in this agreement at your request?

A. Yes, sir.

(Markosian Deposition p. 63, lines 18-25)

Under such circumstances, any uncertainty should be construed against respondent Markosian.

“When the terms of a written contract have been chosen by one of the parties and merely assented to by the other, this fact will in some cases affect the interpretation that will be given to these terms by the court. \* \* \* If, however, it is clear that the parties tried to make a valid contract, and the remaining doubt as to the proper interpretation is merely as to which of two possible and reasonable meanings should be adopted, the court will adopt the one which is the less favorable in its legal effect to the party who chose the words.”

Corbin on Contracts, Section 559.

**E. IF THE AGREEMENT IS AMBIGUOUS CONCERNING A MANDATORY REPURCHASE, THEN THE COURT SHOULD RECEIVE PAROL EVIDENCE AS TO THE INTENT OF THE PARTIES BECAUSE:**

1. The Agreement was not intended as an integrated document; rather, it contemplated a separate and additional employment contract which would define the rights and duties arising from employment.

The rule against permitting parol evidence to aid in the construction of a written document is predicated upon the proposition that the written document is the final recitation of the intent of the parties and was intended to cover all of the rights of the parties. Where it is clear, however, that the written document was not intended to be the final

and complete embodiment of the intent of the parties, then additional evidence is permissible. By the very terms of the Agreement in question, it provides that within 30 days after the signing of the Agreement, a contract of employment would be entered into by and between the Corporation and Markosian (R. 8). This contract of employment was never consummated and, therefore, parol evidence should be permitted to show the intent of the parties as it pertained to the general subject of the employment of the defendant.

2. The divergent opinions of the parties would at least indicate that the contract is uncertain in this regard and requires amplification by parol evidence.

All the foregoing arguments would indicate that the Court should rule as a matter of law that there is no mandatory repurchase requirement specified in the Agreement where the respondent voluntarily resigns his employment with the Corporation. These arguments, if not conclusive, certainly have sufficient merit to indicate that the contract is not clear on this subject matter, but rather is uncertain. If there is uncertainty or ambiguity or if the language is susceptible of more than one meaning, then the Trial Court should be permitted to receive evidence as to the true intent of the parties and the Pre-Trial Judge should not rule as a matter of law precluding such evidence. *Ephraim Theatre Company v. Hawk*, 7 Utah 2d 163, 321 P. 2d 221 (1958); 53 Am. Jur., *Trial*, Sec. 266 (1945).

## CONCLUSION

The Pre-Trial Court's interpretation requiring mandatory repurchase of stock, after the voluntary resignation by the respondent, disregards the language in the Agreement which contemplates that the termination would be by the Corporation. Such interpretation ignores other sections of the Agreement which specifically discuss the situation in the event of voluntary resignations and the sale of stock to outsiders; it permits the respondent to profit from his own wrongdoing in breaching the terms of the five-year employment clause. In addition, any uncertainty in the provisions of the contract on this issue should be construed against the respondent, who insisted upon such provisions and initially drafted them for insertion into the Agreement. Further, the Pre-Trial Judge should not rule as a matter of law precluding the Trial Court from considering the evidence that the Agreement was not intended as an integrated document and precluding parol evidence as to the true intent of the parties since the Agreement, if not susceptible of the construction urged by the appellants, is then ambiguous and requires further amplification. But most of all, such construction should not be sustained to permit this respondent to profit from his own wrongdoings at the expense of the other parties to the contract.

Respectfully submitted,

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